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BOOK REVIEWS

The Law of Obligations in Europe: A New Wave of Codifications. by Reiner Schulze and Fryderyk Zoll (eds.) [Munich: Sellier European Law Publishers, 2013. xiv +458 pp. Paperback €79.00. ISBN 978-3-86653-246-5.]

The Making of European Private Law: Why, How, What, Who. by Luigi Moccia (ed.) [Munich: Sellier European Law Publishers, 2013. xii +225 pp. Paperback €49.00. ISBN 978-3-86653-258-8.]

A comparative lawyer employing a structuralist scheme of intelligibility might be tempted to assert that a book of published conference papers on the law of obligations and another one on private law are irrelevant to common lawyers since neither of the categories – that is to say the law of obligations and private law – are strictly speaking to be found in English law. The late Peter Birks would have disagreed, of course, and there are many contemporary common law jurists who theorise about "private law". But it is sometimes useful for jurists to remind themselves that attempting to reconceptualise the common law through the categories of Justinian's *Institutes* is something of an artificial exercise. The scheme does not easily fit a tradition of thinking that for many centuries operated through categories such as debt, trespass, and nuisance themselves ordered only via the alphabet. Was Nicholas Kasirer exaggerating when he suggested that the common law is little more than "chaos with an index"?

How, then, is the common lawyer to react when faced with a set of conference papers, edited by two leading civilians, on the law of obligations which has as one of its aims the facilitation of the harmonisation of private law in Europe? One reaction, implied by the book itself, is that this is an exercise from which the common law is excluded. It is on dry land as this particular wave washes over continental Europe. Consequently, there is no chapter on English law. There are, however, contributions from Scots jurists and of course the English law of "obligations" (contract, tort, and restitution) has not been unaffected by European Union law. Yet, reading all of the contributions, one wonders whether, if harmonisation is to happen, it should happen on the basis of the conceptual approach assumed in all of the contributions to this chapter. The late Tony Weir never stopped insisting that 90% of all claims for breach of contract that came before the English courts were actions in debt. Contract is largely about people who do not pay (and it was people who were unable to pay that were the ultimate cause of the 2008 financial crisis). It must surely be the case that this is true of all the countries mentioned in this book of papers; a large percentage of contractual promises are promises to pay a sum of money. Now, given that a debt is a form of property, why do jurists continue to insist on a strict division between property and obligations? Why is there not any radical rethinking about legal taxonomy and its relation to contemporary economic and social reality? One obvious answer is that this collection of papers on the law of obligations does not have such a radical aim; its purpose is simply to deliver a series of reports on the legal reforms that have been incorporated into 11 different laws of obligations.

In some ways, this lack of intellectual ambition is to be regretted. The history of legal thought in both the civilian and the common law world remains surprisingly relevant on occasions (although on other occasions it can be a menace). For example, if one were to abandon a structuralist approach for a functionalist one, the old

categories of trespass (damages) and debt seem surprisingly relevant. It would appear that people were not paying what they promised centuries ago and the way to deal with it was not to have a long discourse on contract formation and damages but to have a proprietary-type remedy. A functionalist approach adopted in respect of the law of tort would surely see every nation moving towards the idea, to be found in several civilian systems, of damage arising from an activity rather than an act. Here, of course, English law is bizarre: the sources of most tort cases are accidents on the road and in the workplace – accidents arising out of an activity with statistically predictable victims – yet English law insists that it is all about fault and commutative justice. How insurance companies must be laughing all the way to their taxpayer supported banks. Even EU-inspired factual classifications such as "product liability" seem odd. How many people are injured by their toasters in the morning? (Apparently more than by shark attacks.) If it is pharmaceutical products that are the real target, then how about a category that matches this reality? In short, reform is certainly needed in the area of the present law of obligations in Europe, but this collection of papers – probably through no fault of their authors – is devoting itself to reforms in a world that has been created by structuralist jurists whose structures no longer bear much relation to the real world. No wonder that the European peoples are sending a message via the ballot box. But are jurists listening?

The second book of papers under review is concerned, in theory, with private law but in practice quite a few of the papers are devoted to the Common European Sales Law (CESL). Jurists interested by such a text will find a range of engagements of varying intellectual quality. Professor Hugh Beale is, perhaps surprisingly given that we are talking of one of England's leading common lawyers, supportive though not uncritical. He sees the text as a "step in the right direction". He does, however, make an excellent point that few of the other contributors seem to appreciate. If there is a dispute, Hugh Beale points out, "problems of dispute resolution and of enforcement are far more important than those of the substantive law, which is the only issue that the CESL tackles" (p. 76). Given the gradual move towards "privatisation" of the courts system in England (the system will eventually have to pay for itself), together with the abolition of legal aid, texts on substantive law like the CESL will be largely irrelevant for most ordinary people. Even many judges think that enforcing one's rights through the courts is to be discouraged (in favour of mediation). Perhaps, then, Europe should be focusing more on access to justice than to culturally bland texts about sales.

What is more discouraging is that some of the other contributions to this second volume under review indicate why jurists are unlikely to be taken seriously by social scientists. One writer asserts that the time has come to adopt, on a mandatory basis, a European Common Contract Law because the "European Union needs to create more and more European citizenship feeling among its inhabitants" (p. 111). This same paper also asserts that the CESL will provide "more certainty because the core of rules is not scattered in several directions" (p. 116). No serious research is offered in support of these rather extraordinary statements. Perhaps worse, in some ways at least, is a chapter that promises to "present an economic argument showing how [the] critiques [of the CESL] present theoretical flaws" (p. 93). This is surely just what is needed? Well, yes, provided that there is a wealth of economic research to support the authors' claim. A quick glance at the footnotes will soon confirm, once again, why those working in other social science disciplines find it hard to take lawyers seriously when it comes to epistemological issues.

This said, there are some missed opportunities. There is a useful aside with regard to article 58(3) CESL: is not the use of the "reasonable person" with regard

to interpretation "an unnecessary fiction" (p. 185)? This reference to fiction is intriguing in that fiction theory might have provided a most interesting vehicle for an epistemological analysis of texts like the CESL, especially given the renewed interest in Hans Vaihinger. Property law could have proved interesting. Sief van Erp argues that a European property law is feasible despite the differences between the civil and the common law approaches. One might gain much, he says, by looking at the US experience with regard to the interplay between federal and state law (pp. 158–59). There may be something in this, but, again, one wonders whether his "reconstruction process" which can be employed "to understand how [the] various thought patterns can be used to create diverging, but not fundamentally different systems" (p. 150) is based on any understanding of the property regimes in the English common law (of which there are three according to Bernard Rudden). His assertion that deconstruction "shows that property law systems have a pyramid like structure" which at its apex has "a primary right . . . which gives its holder the most extensive position against a considerable number of other persons (or even 'the world') with regard to an object" (p. 150) is simplistic to say the least about English property regimes.

Indeed, there seems to be little recognition here that trying to impose a distinction between property and obligations in English law is unrealistic. English personal property law is to be found within the law of "obligations", as are many of the remedies protecting possession and enjoyment of land. The obsession with real rights pyramids might appeal to the civil lawyer, but it can equally amount to legal imperialism when imposed on non-civilian systems. One might also ask if continuing to think in terms of ownership, possession and real rights really represents the future. These concepts were developed by the Romans at a time when wealth was measured largely in terms of physical property and, although Gaius provided the conceptual language for intangible things, it is surely arguable that they are now not only unsuitable for describing modern intangibles (see e.g. *Your Response Ltd v Datateam Business Media Ltd* [2014] 3 W.L.R. 887) but actively contribute to gross inequality in Europe (investment in empty apartments in London). Has not the time come for some radical rethinking? Property law is surely too fundamental to be confined within "private law".

Sadly, neither of these two books provides any inkling of radical thinking. Much of the space is taken up either with national reports on the law of obligations, by definition descriptive in nature, or with astrological-like predictions (rather than research-based predictions) about the CESL. Perhaps the most interesting remark, therefore, is the very last one in the second of the two books under review: "Much Ado about Nothing or All shall be well and Jack shall have his Jill?" (p. 225). This writer certainly captures the intellectual atmosphere of both the conferences upon which these two books are based.

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Viking, Laval and Beyond. Edited by Mark Freedland and Jeremias Prassl [Oxford and Portland, OR: Hart Publishing, 2014. 371 pp. Hardback £60.00. ISBN 978-1-84946-624-0.]

Viking, Laval and Beyond is the first book of a new series that seeks to explore European Union (EU) membership through "landmark" European Court of

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